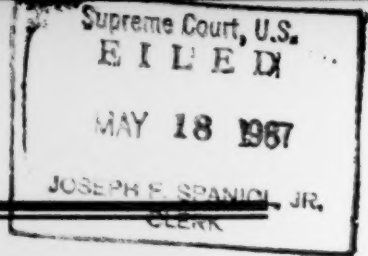


(3)
No. 86-1468



In the Supreme Court of the United States
October Term, 1986

BSP INVESTMENT and DEVELOPMENT, LTD.
PETITIONER

v.

UNITED STATES OF AMERICA

REPLY TO MEMORANDUM FOR THE UNITED STATES IN
OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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1. Issue of Disparate Treatment in Violation of Equal Protection Was Timely Raised.

The Memorandum of the United States in Opposition argues that petitioner failed in the courts below to raise the constitutional question of disparate treatment as a violation of the Equal Protection clause and that there are no facts in the record to support this claim.

This argument is totally in error. The issue of the disparate treatment by the United States Customs Service between travelers arriving by airplane and those arriving by automobile was raised in the first brief of petitioner in support of its motion for summary judgment at the District Court level submitted June 12, 1981. Pre-Trial Memorandum of Claimant, pp. 9-10.

The disparate treatment argument was reiterated by claimant in its brief submitted August 10, 1984 to Honorable Fred M. Taylor, District Judge, before trial after remand. Pre-Trial Memorandum of Claimant, pp. 14-15.

At the trial claimant offered in evidence U.S. Customs Declaration Form 6059D which is routinely given to every arriving airline passenger. Exhibit No. 130, RT., p. 31, L. 5-13. A considerable colloquy then occurred between Court and counsel in which Judge Taylor stated that he thought the opinion of the Ninth Circuit Court of Appeals on remand precluded a defense based upon the difference between treatment accorded ground travellers and air travellers. RT., p. 32, L. 23-25; p. 33, L. 1-25; p. 34, L. 1-18.

Form 6059D was admitted into evidence. RT., p. 37, L. 7-10. The trial record clearly established that Inspector Walter L. Wilson, acting pursuant to instructions, never offered Form 6059D or any other declaration form to Robert J. Pascoe or William A. Stark because travellers entering by automobile are treated differently. RT., p. 31, L. 11-21; p. 32, L. 1-16.

The factual record is fully established. Judge Taylor decided the case on other grounds so he had no reason to make any factual findings in disparate treatment. The evidence in the record as to differing treatment is undisputed.

The issue of disparate treatment was raised again upon the second appeal to the Ninth Circuit in claimant's opening brief under the specific heading "Automobile Entrant Given No Form". Opening Brief of Appellant, pp. 25-26. The final brief twice

noted that all air travellers are given Form 6059D while automobile entrants are given nothing. Reply Brief of Appellant, pp. 6 and 18.

At the hearing on appeal, undersigned counsel for claimant physically showed and read from Form 6059D (Ex. 130) in making oral argument to the panel upon the disparate treatment issue.

Judge Stephens in dissent, while not attaching the label of Equal Protection, found disparate treatment to be unfair:

The Secretary could avoid one major element of unfairness by requiring that *all persons* entering or leaving the United States be given a written explanation of the reporting requirements before any questions are asked concerning transportation of currency. (emphasis supplied.)

804 F.2d at 1091.

The second issue concerning disparate treatment as violating the Equal Protection clause has been raised in the courts below from the beginning of this case and should be grounds for issuing a Writ of Certiorari.

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May, 1987.